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No. 78-926

In the Supreme Court of the United States

OCTOBER TERM, 1978

DONALD L. JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is not reported. The opinion of the district court (Pet. App. 5a-14a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1978. A petition for rehearing was denied on November 13, 1978 (Pet. App. 3a). The petition for a writ of certiorari was filed on December 11, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was improperly denied the procedural protections of the Federal Election Campaign Act.

2. Whether the Attorney General had authority to prosecute petitioner for violations of the federal election laws in the absence of a referral of the case from the Federal Election Commission.

3. Whether petitioner was denied the right to represent himself at trial.

STATEMENT

After a jury trial in the United States District Court for the Western District of New York, petitioner was convicted of knowingly and willfully furnishing false, fictitious, and fraudulent evidence and information to the Federal Election Commission, in violation of 26 U.S.C. 9042(c). He was sentenced to two years' imprisonment. The court of appeals affirmed (Pet. App. 1a-2a).

The evidence adduced at trial showed that on March 6, 1976, petitioner applied to the Federal Election Commission for matching funds to finance his 1976 presidential campaign. Petitioner claimed that he had raised $110,000 in contributions and that he was therefore entitled to receive matching federal funding under the Presidential Primary Matching Payment Account Act, 26 U.S.C. 9031 *et seq.*[1] The application set forth the names of the alleged contributors, their addresses, their occupations, and the amount each contributed. On March 17, 1976, petitioner submitted a statement to the Commission agreeing to furnish books and records to verify his eligibility. Petitioner again claimed to have raised the necessary minimum contributions to qualify for matching funds. Subsequent investigation revealed that many of the alleged contributions had not occurred (Tr. 61-82, 83-86, 87-91, 107-110).

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[1]To be eligible for matching funds a candidate must have received contributions exceeding $5,000 from residents of at least 20 states, with the contribution from any person not exceeding $250. See 26 U.S.C. 9033(b)(3) and (4).

ARGUMENT

1. Petitioner contends (Pet. 17-19) that before referring his case to the Department of Justice for prosecution the Federal Election Commission had a statutory obligation under 2 U.S.C. 437g (a)(2), (4), and (5)(A)[2] to notify him of any alleged violations and to give him a reasonable opportunity to show why the Commission should not take action against him. Petitioner's contention is without merit. As the district court noted (Pet. App. 7a-9a), the procedures relied on by petitioner are pertinent only to civil investigations undertaken by the Commission as a precondition to instituting a civil action for injunctive relief or civil penalties pursuant to 2 U.S.C 437g(a)(5)(B).[3]

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[2]2 U.S.C. 437g(a)(2), (4) and (5)(A) provide:

> (2) The Commission, upon receiving a complaint under paragraph (1), and if it has reason to believe that any person has committed a violation of this Act or of chapter 95 or chapter 96 of Title 26, or, if the Commission, on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, has reason to believe that such a violation has occurred, shall notify the person involved of such alleged violation and shall make an investigation of such alleged violation in accordance with the provisions of this section.
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> * * * * *
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> (4) The Commission shall afford any person who receives notice of an alleged violation under paragraph (2) a reasonable opportunity to demonstrate that no action should be taken against such person by the Commission under this Act.
>
> (5)(A) If the Commission determines that there is reasonable cause to believe that any person has committed or is about to commit a violation of this Act or of chapter 95 or chapter 96 of Title 26, the Commission shall make every endeavor for a period or not less than 30 days to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with the person involved. * * *

[3]The procedures are applicable only where the Commission itself is to take action "against such person * * *." 2 U.S.C. 437g(a)(4). Where the Commission refers the case to the Attorney General under 2 U.S.C. 437g(a)(5)(D), it is the Attorney General and not the

Those procedures have no application to the prosecution of criminal violations by the Attorney General. *United States* v. *Tonry*, 433 F. Supp. 620, 622-623 (E. D. La. 1977).

2. Petitioner next contends (Pet. 16-17) that, because this Court held in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), that the Federal Election Commission was unconstitutionally constituted, the Commission lacked any power to refer petitioner's case to the Attorney General for prosecution. Petitioner's theory is that his case was "not legally referred to the Justice Department" and that the Department therefore lacked "jurisdiction" to prosecute him (Pet. 16). This claim is insubstantial.

This Court's decision in *Buckley* v. *Valeo* did not invalidate the Commission's powers to refer a case to the Department of Justice. Even if it had, the existence or non-existence of such authority in the Commission is not relevant to the authority of the Attorney General to investigate and prosecute alleged violations of 26 U.S.C. 9042(c). The Attorney General is authorized by 28 U.S.C. 515 and 516 to enforce all federal criminal statutes (*Kennedy* v. *Rabinowitz*, 318 F. 2d 181, 183, n.9 (D.C. Cir. 1963), aff'd, 376 U.S. 605 (1964)) and, as chief legal officer of the United States, he has the authority and duty to control and supervise all criminal proceedings. *United States* v. *Alessio*, 528 F. 2d 1079 (9th Cir.), cert. denied, 426 U.S. 948 (1976); *United States* v. *Greater Blouse, Skirt and Neckwear Ass'n*, 228 F. Supp. 483 (S.D.N.Y. 1964). By enacting 26 U.S.C. 9042(c) to prohibit the filing of false information with the Federal Election Commission, Congress authorized the Attorney General to

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Commission who determines whether to take action "against such person." Any contrary determination by the Commission can neither compel nor forestall prosecution in the discretion of the Attorney General. See *United States* v. *Tonry*, 433 F. Supp. 620, 623 (E.D. La. 1977).

prosecute violations without requiring the formal approval or consent of the Commission. *United States* v. *Tonry, supra*, 433 F. Supp. at 622-623.

The statutory provision that authorizes the Commission to refer apparent criminal violations to the Department of Justice (2 U.S.C. 437g(a)(5)(D)) does not restrict the Attorney General's independent criminal enforcement powers. See note 3, *supra*. This statutory provision, which is designed to allow the Commission to refer an apparent violation to the Attorney General without first engaging in the conciliation procedures outlined in 2 U.S.C. 437g(a)(5)(A), is directed solely to the administrative responsibilities of the Commission itself. The fact that the Commission may not, in some circumstances, refer a case to the Attorney General would not limit the authority of the Attorney General to prosecute violations of the criminal statute. *United States* v. *Tonry, supra*.

3. Petitioner contends (Pet. 20-29) that he was denied the right to represent himself at trial. The record does not support petitioner's claim.[4] Petitioner retained three separate attorneys during his trial. The first discontinued his representation, the second died unexpectedly, and the third continued through trial (C.A. App. 2-4). For at least a portion of the proceedings petitioner did in fact represent himself (*id.* at 3).

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[4]Petitioner notes (Pet. 22) that when he initially sought leave to proceed pro se, the government opposed his motion. The government's opposition was based on concern that there was then pending a request for a mental competency examination and that petitioner should not be permitted to represent himself until the results of that examination had been obtained. Shortly after the district court ordered a mental examination to determine petitioner's competency, petitioner retained private counsel.

Moreover, many of the pleadings were prepared by petitioner, and petitioner handled his own appeal. Petitioner's claim lacks any factual foundation.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5]Petitioner raises many additional issues but makes no attempt to explain or substantiate the allegations by reference to the trial record. See Rules 19(1)(b), 23(1)(h) (3) and (4) of the Rules of this Court. Since it is not possible to determine the nature of many of petitioner's complaints, we are unable to respond to them.

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